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Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	Case No. 08-cv-1166 IEG (POR) **INNOVATION VENTURES, LLC dba LIVING ESSENTIALS' NOTICE OF MOTION TO FILE EXHIBIT C TO DECLARATION OF SCOTT HENDERSON UNDER SEAL** Courtroom.: 1, Fourth Floor Judge: Irma E. Gonzalez Date Filed: 07/01/08

PLEASE TAKE NOTICE that Defendant Innovation Ventures, LLC, dba Living Essentials ("Living Essentials"), will and hereby does move the court to enter an order allowing the filing under seal of Exhibit C to the declaration of Scott Henderson in support of Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction. This motion is based upon this notice of motion and motion, the points and authorities, the authorities cited therein, the declaration of Scott Henderson and Exhibit C thereto (both submitted with the Opposition to Plaintiff's Motion for Preliminary Injunction), and the proposed order. As there is no protective order yet entered in this case, and Exhibit C is the report of a highly proprietary and confidential study, the Court should grant this motion to file under seal and designate it as for plaintiff's outside counsel's eyes only or other designation as this Court deems appropriate.

Dated: August 29, 2008

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC

By *s/Nathan Hamler*
Nathan R. Hamler, Esq.

Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

Mark A. Cantor (MI Bar No. P32661)
Pro Hac Vice Application Submitted
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CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 29, 2008, I filed a copy of the following document(s):

INNOVAION VENTURES, LLC dba LIVING ESSENTIALS' NOTICE OF MOTION TO FILE DOCUMENT UNDER SEAL

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Norman L. Smith, Esq.
Edward J. McIntyre, Esq.
Alison L. Pivonka, Esq.
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Attorneys for Plaintiff
HANSEN BEVERAGE COMPANY

nsmith@swsslaw.com
emcintyre@swsslaw.com
apivonka@swsslaw.com

Executed on August 29, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan Hamler
Nathan R. Hamler, Esq.

4416011v.1

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Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation,

Plaintiff,

v.

INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation,

Defendant.

Case No. 08-cv-1166 IEG (POR)

INNOVATION VENTURES, LLC dba LIVING ESSENTIALS' POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO FILE EXHIBIT "C" TO DECLARATION OF SCOTT HENDERSON UNDER SEAL

Courtroom.: 1, Fourth Floor
Judge: Irma E. Gonzalez

Date Filed: 07/01/08

Exhibit C to the declaration of Scott Henderson is a highly proprietary and confidential report of a clinical study conducted by Defendant Innovation Ventures, LLC, dba Living Essentials (“Living Essentials”). The clinical study contains confidential and highly sensitive business information that is closely protected and maintained by Living Essentials. Declaration of Scott Henderson, ¶ 21; *see also* Exhibit C (not electronically filed; submitted to chambers). It has not been publicly disclosed, and if this information is disclosed to others, in particular to competitors or potential competitors of Living Essentials, this could cause significant harm to Living Essentials and its business. *Id.*

A confidential document may be filed under seal and restrictions on its disclosure imposed if good cause is shown. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) (no presumption of public access attaches to such documents); FRCP 26. “Good cause” is demonstrated where disclosure of “confidential research, development, or commercial information” may cause harm. FRCP 26(c)(7). As a result, courts routinely authorize the filing of unpublished clinical studies under seal, recognizing their confidential and sensitive nature. *See, e.g. Bracco Diagnostics, Inc. v. Amersham Health Inc.*, 2007 WL 2085350 **9-10 (D.N.J. July 18, 2007) (sealing clinical study and “wholly disagree[ing]” with competitors’ argument that it would be improper to protect clinical results of the product’s effectiveness); *Grundberg v. Upjohn Co.*, 140 F.R.D. 459, 465 (D. Utah 1991) (cases cited therein).

In the present case, good cause exists. Plaintiff has not formerly made the entirety of Exhibit C publicly available, and has kept it under strict confidentiality. The Five Hour Diet product is an energy supplement in an energy shot form, and as such the complete study contained in Exhibit C detailing its clinical properties goes to the heart of its competitive advantage. A competitor looking to enter the energy shot market (*aka* Plaintiff Hansen Beverage) will gain tremendous advantage by learning the clinical properties of the market leader, and should not gain such advantage simply by surreptiously filing a lawsuit against it. *Asch/Grossbardt Inc. v. Asher Jewelry Co., Inc.*, 2003 WL 660833 *3 (S.D.N.Y. Feb. 28, 2003) (courts should enter orders limiting distribution of confidential competitor information lest a lawsuit unwittingly be used as a “predatory” practice to gain competitive intelligence). Conversely, disclosure to a competitor would result in Living Essentials' loss of a competitive edge it has heretofore closely guarded. It would take the hard efforts made by Living Essentials and simply hand them to a competitor to benefit its own product development without having to itself incur the cost of such a study. *Id.* As such, this information falls within the class of information recognized in this District to constitute outside attorney's eyes only material that should only be submitted under seal. S.D. Cal. L.R. Appendix A "Approved Form of Protective Order" at ¶¶ 3, 4(b), 12.

Thus, without an order sealing, Living Essentials will be placed in the untenable position of having to choose between effectively opposing an overbearing attempt to enjoin sales of the Five Hour Diet product (to which this clinical study is crucial) and handing away highly confidential and competitively valuable information to a major competitor. It is for these reasons that good cause more than exists to allow Living Essentials to file Exhibit A under seal and have it designated as for outside attorney's eyes only. *Bracco Diagnostics, Inc.*, 2007 WL 2085350 at **9-10.

Given these concerns, Living Essentials requests narrow relief. First, the Court should enter an order accepting the filing of Exhibit C under seal. Second, the Court should order that, while a copy be provided to plaintiff's litigation counsel, disclosure of the study or its contents be restricted to plaintiff's outside counsel only. As the Southern District has already accepted, this properly balances plaintiff's need to use the information in formulating a reply, and the unacceptable risk of utilization or inadvertent disclosure from highly sensitive commercial information to any employee of Hansen Beverage. S.D. Cal. L.R. 3, 4(b); Appendix A "Approved Form of Protective Order" (documents should be designated outside attorney's eyes only and only filed under seal when they contain information "considered to be most sensitive by the party, including but not limited to trade secret or other confidential research, development, financial or other commercial information"); *Asch/Grossbardt, Inc. v. Asher Jewelry Co., Inc.*, 2003 WL 660833 at * 2 ("Ample precedent exists for limiting disclosure of highly sensitive, confidential or proprietary information to outside attorneys and experts, particularly when there is some risk that a party might use the information or disseminate it to others who might employ it to gain a competitive advantage over the producing party."); *Blanchard and Co., Inc. v. Barrick Gold Corp.*, 2004 WL 737485 *9 (E.D. La. Apr. 5, 2004).

As stated in the declaration of Nathan Hamler in support of motion to seal, submitted herewith, prior to filing this motion, Plaintiff's counsel was informed of Living Essentials' intent to pursue this motion. In addition, Living Essentials offered to provide Plaintiff's counsel a copy of Exhibit C to the Henderson declaration in advance of a ruling on this motion, provided that Plaintiff's counsel agreed to treat the document as confidential -- attorneys' eyes (outside counsel) only pending the resolution of this motion. (*See* Hamler Decl., ¶ 2, Ex. A.) Plaintiff's counsel responded that they would agree to treat the document as confidential -- attorneys' eyes and experts' eyes only, provided that Living Essentials agree that Dr. Davis, an employee of Hansen Beverage Company who submitted an "expert" declaration with Hansen's motion for preliminary injunction, be allowed to review it. (*Id.* ¶ 3). Because Dr. Davis is not an outside expert but is a Hansen employee Living Essentials has not provided a copy of Exhibit C to opposing counsel as of the filing of this motion.

For the foregoing reasons, the proposed order submitted herewith should be entered.

Dated: August 29, 2008

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC

By *s/Nathan Hamler*
Nathan R. Hamler, Esq.

Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

Mark A. Cantor (MI Bar No. P32661)
Pro Hac Vice Application Submitted
Marc Lorelli (MI Bar No. P63156)
Pro Hac Vice Application Submitted
Thomas W. Cunningham (MI Bar No. P57899)
Pro Hac Vice Application Submitted
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Facsimile: (248) 358-3351

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 29, 2008, I filed a copy of the following document(s):

INNOVATION VENTURES, LLC dba LIVING ESSENTIALS' POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO FILE EXHIBIT "C" TO DECLARATION OF SCOTT HENDERSON UNDER SEAL

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Norman L. Smith, Esq. Edward J. McIntyre, Esq. Alison L. Pivonka, Esq. **SOLOMON WARD SEIDENWURM & SMITH** 401 B Street, Suite 1200 San Diego, CA 92101 (619) 231-0303	Attorneys for Plaintiff HANSEN BEVERAGE COMPANY nsmith@swsslaw.com emcintyre@swsslaw.com apivonka@swsslaw.com

Executed on August 29, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan Hamler
Nathan R. Hamler, Esq.

4416405v.1

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Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	Case No. 08-cv-1166 IEG (POR) **DECLARATION OF NATHAN R. HAMLER IN SUPPORT OF LIVING ESSENTIALS' MOTION TO FILE EXHIBIT C TO DECLARATION OF SCOTT HENDERSON UNDER SEAL** Courtroom.: 1, Fourth Floor Judge: Irma E. Gonzalez Date Filed: 07/01/08

I, NATHAN R. HAMLER, DECLARE AS FOLLOWS:

1. I am an attorney at law duly licensed to practice law in the State of California, and am an associate with the law firm of Mintz Levin Cohn Ferris Glovsky and Popeo, P.C, local counsel for Defendant Innovation Ventures, LLC dba Living Essentials. I have personal knowledge of the facts set forth in this declaration and could and would competently testify as to the same.

2. I attempted to contact litigation counsel for Plaintiff Hansen Beverage Company concerning the filing of Exhibit C to the declaration of Scott Henderson under seal. First, on August 29, 2008, I attempted to call Edward McIntyre but I was informed he would not be returning for the day. I also left a voicemail message Allison Pivonka. Finally, I sent an email to Mr. McIntyre, Ms. Pivonka and Mr. Smith, a true and correct copy of which is attached hereto as Exhibit A. In that email, I informed Plaintiffs' counsel that Living Essential would be filing a motion to seal an exhibit to a declaration--a clinical study. I also indicated that I would promptly provide a copy of Exhibit C to the Henderson declaration to Plaintiff's counsel provided that Plaintiff's counsel agreed to treat this document as confidential -- attorneys' eyes (outside counsel) only pending the resolution of Living Essential's motion to seal.

3. Plaintiff's counsel responded that they would agree to treat Exhibit C as confidential outside counsel and experts' eyes only, provided that Dr. Davis be allowed to see the document. (*See* Exhibit A). I am informed and believe, however, that Dr. Davis is not an outside expert but is an employee of Plaintiff Hansen Beverage Company.

4. Upon receiving Plaintiff's response I emailed Plaintiff's counsel indicating that, while the motion to seal is pending, Living Essentials could only provide a copy of Exhibit C to the Henderson Declaration if Plaintiff agreed to limit disclosure to outside counsel only, or to an outside expert who is not also an employee of Hansen (who also agrees to appropriate confidentiality restrictions). (*See* Exhibit A).

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration is executed this 29th day of August, 2008 at San Diego, California.

s/Nathan Hamler
Nathan R. Hamler

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 29, 2008, I filed a copy of the following document(s):

DECLARATION OF NATHAN R. HAMLER IN SUPPORT OF LIVING ESSENTIALS' MOTION TO FILE EXHIBIT C TO DECLARATION OF SCOTT HENDERSON UNDER SEAL

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Norman L. Smith, Esq. Edward J. McIntyre, Esq. Alison L. Pivonka, Esq. **SOLOMON WARD SEIDENWURM & SMITH** 401 B Street, Suite 1200 San Diego, CA 92101 (619) 231-0303	Attorneys for Plaintiff HANSEN BEVERAGE COMPANY nsmith@swsslaw.com emcintyre@swsslaw.com apivonka@swsslaw.com

Executed on August 29, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan Hamler
Nathan R. Hamler, Esq.

4416821v.1

EXHIBIT A

Hamler, Nathan

From: Hamler, Nathan
Sent: Friday, August 29, 2008 4:06 PM
To: William N. Kammer
Cc: Hamler, Nathan
Subject: RE: Hansen Beverages/Living Essentials

Bill,

As Dr. Davis is not an independent expert but a Hansen employee (if I understand correctly, their technology director), Living Essentials cannot agree to allow Dr. Davis to review this document pending resolution of our impending motion to seal. Living Essentials will, however, agree to allow outside counsel or an independent expert who is not also a Hansen employee and who agrees to appropriate confidentiality restrictions to review the exhibit on which we are filing a motion to seal.

If Hansen is in agreement with this, let me know. Otherwise, I cannot provide a copy of this document to you in advance of an appropriate Court order.

Regards,

Nate

Nate Hamler | Attorney
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3580 Carmel Mountain Road | Suite 300 | San Diego, CA 92130
Phone:858.314.1510 | Fax:858.314.1501
E-mail: nhamler@mintz.com
Web: www.Mintz.com

From: William N. Kammer [mailto:WKammer@swsslaw.com]
Sent: Friday, August 29, 2008 3:45 PM
To: Hamler, Nathan
Subject: RE: Hansen Beverages/Living Essentials

Nathan,

We are short-handed today; Ed is taking his daughter to college.

We will agree to treat the report as "confidential -- outside attorney and expert witness eyes only" (including Dr. Davis) provided that the report is not already in the public domain, subject of course to an application to the court for relief on appropriate grounds.

Bill

From: Norman L. Smith
Sent: Friday, August 29, 2008 2:36 PM
To: William N. Kammer; Michael M. Vasseghi
Subject: FW: Hansen Beverages/Living Essentials
Importance: High

From: Hamler, Nathan [mailto:]
Sent: Friday, August 29, 2008 2:26 PM
To: Norman L. Smith; Edward J. McIntyre; Alison L. Pivonka
Cc: Hamler, Nathan
Subject: Hansen Beverages/Living Essentials
Importance: High

Counsel:

I understand Ed is out the rest of today, and I left a voice mail for Ms. Pivonka. As indicated in that voice mail, we are filing Living Essentials' opposition papers to Hansen's motion for a preliminary injunction today. One of the documents we will be submitting -- an exhibit to a declaration -- is a clinical study that we are moving to file under seal and to have the document deemed as confidential --attorneys' eyes only (outside counsel only) for purposes of this litigation.

We will be filing and serving our papers shortly. If you can agree to treat the document on which we are moving to file under seal as confidential -- attorneys' eyes (outside counsel) only pending the resolution of our motion to seal, we will also provide you with a copy of that document this afternoon. Please let me know as soon as possible whether you will so agree.

Regards,

Nate

PLEASE NOTE MY NEW ADDRESS AND PHONE NUMBER, EFFECTIVE AS OF MAY 24, 2008:

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IRS CIRCULAR 230 NOTICE

In compliance with IRS requirements, we inform you that any U.S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties or in connection with marketing or promotional materials.

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The information contained in this electronic message and any attachments to this message are intended for the exclusive use of the addressee(s) and may contain confidential or privileged information. If you are not the intended recipient, or the person responsible for delivering the e-mail to the intended recipient, be advised you have received this message in error and that any use, dissemination, forwarding, printing, or copying is strictly prohibited. Please notify Mintz, Levin, Cohn, Ferris, Glovsky and Popeo immediately at either (617) 542-6000 or at ISDirector@Mintz.com, and destroy all copies of

this message and any attachments. You will be reimbursed for reasonable costs incurred in notifying us.